No. 634

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

GEORGE COTROS et al.,
Petitioners,

vs.

NASHVILLE TRUST COMPANY,
Executor Under Will of CHARLES McCABE, Former Collector Internal Revenue,
Respondent.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Sixth Circuit
and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners George Cotros et al., pray that a Writ of Certiorari issue to review the judgment, or decree, of the United States Circuit Court of Appeals for the Sixth Circuit, entered and filed June 5, 1941 (Record p. 85), and becoming final August 15, 1941, by the granting of a Petition to Rehear, wherein the original decree was modified (Record p. 97), said modified decree of the Circuit Court of Appeals reversing in part the judgment and decree rendered in said cause by the District Court of the United States for the Middle District of Tennessee (Record p. 97).

CASE STATED.

George Cotros et al., the Petitioners, sued the Collector of Internal Revenue at Nashville to recover a judgment or decree for the approximate sum of $25,000.00, paid under protest to the Collector, under a Deficiency Assessment for Income, Capital Stock and Excess Profits taxes, which had been assessed against them as an "Association" within the meaning of Paragraph 801 of the Revenue Act of 1934, after timely claim had been made for refund and a denial thereof (Record p. 2).

The United States District Court rendered a decree in favor of the Petitioners (Record p. 77).

From this judgment or decree the Collector (the Government) appealed; and the Court of Appeals at first reversed the decree of the District Court in its entirety, but later modified its ruling, pursuant to a Petition filed therefor, and granted to Petitioners a recovery of the Excess Profits taxes paid, which was at all times conceded to have been wrongfully collected (Record pp. 85, 97).

The decree of the Court of Appeals, together with its Opinion, upon which said decree was based, denied to the Petitioners any recovery on account of Income taxes and Capital Stock tax, in substance, holding that Petitioners were, in law, an Association taxable as a Corporation (Record p. 86).

FACTS.

The facts are wholly without dispute and are these:

One Guidry had acquired from the State of Louisiana an oil lease, and he, in turn, had assigned all of his interest therein to William Helis, who, in turn, transferred the leasehold interest to the Lincoln Oil Company (Record p. 20).

In August, 1933, the Lincoln Oil Company assigned and transferred unto John A. Papageorge, George Cotros and Nick Taras an undivided one-third interest in said leasehold, which covered 2,640 feet of the bed of Bayou La Fourche (Record, Exhibit A). The consideration was $20,000.00, this sum being advanced, or paid, by Cotros, Papageorge and Taras to the Lincoln Oil Company, and represented approximately one-third of the cost of developing the property for oil (Record p. 21 and Exhibit A). Under the terms of the lease the expenses in connection with the operation of any wells discovered upon the property were to be paid out of the revenue derived from the oil produced (Record, Exhibit A). Cotros, P. and T. later were solicited by friends in Memphis for an interest in the leasehold (fractional part owned by C., P. and T.), and not caring to take the hazard of being out the entire $20,000.00, they, C., P. and T. agreed to permit their friends to acquire an interest therein. Evidencing the interest so acquired in the leasehold, the parties, C., P. and T., on the one hand, and their friends who sought an interest in the leasehold, on the other hand, entered into a contract which, in the Record, is known as the Indenture Agreement, and which is to be found in its entirety in the Record, pages 23-28.

The preamble of this contract referred to the fractional one-third interest in the leasehold acquired by C., P. and T. and to the fact that said parties had agreed to pay therefor the sum of $20,000.00, and that "the parties whose names are annexed hereto, other than George Cotros, John Papageorge, Nick Taras, desire to obtain an interest in the profits to be derived from, and on account of, the leasehold interest assigned * * *; and that C., P. and T. are willing that said other parties may have an interest in said profits upon payment of the amounts set opposite their respective names hereafter shown, and in the proportion which the respective amounts appearing opposite the

names bear to the sum of $20,000.00," it was, therefore, agreed—

1. That the parties whose names were subscribed to the instrument, excluding Cotros, Papageorge and Taras, were entitled to an interest in the net proceeds or profits derived from the production of the oil, gas and minerals "from said leasehold interest" to the extent that the amount set opposite their names bore to $20,000.00.

2. That Cotros, P. and T. were to be entitled to share equally in said profits derived from the oil and minerals produced from said leasehold estate to the extent that the difference between the total amount subscribed by the other parties bore to the sum of $20,000.00.

> "The said George Cotros, John Papageorge and Nick Taras, in whose names the title to said leasehold interest stands (same having been transferred to them by the Lincoln Oil Company * * *), are Trustees for the benefit of all parties whose names are annexed to this instrument. They are given full power and control over said *leasehold interest;* to manage that interest (Leasehold) as they see fit; to sell, assign or transfer the same at any time, and for any amount which to them seems to be right and proper, so long as they act in good faith and make a proper accounting to the others who are parties to this instrument * * *." (Italics ours.)

This Indenture was signed by some twenty-two parties who paid to Cotros, P. and T. for the interest acquired $4,150.00. It was likewise signed by Cotros, P. and T. (Record pp. 26-28).

The interest thus acquired by the parties to the instrument, other than Cotros, P. and T., represented 4,150/20,000ths in the leasehold estate, Cotros, P. and T. retaining the remaining interest.

Prior to the execution of the Indenture referred to

above, Cotros, P. and T. gave a power of attorney to the Lincoln Oil Company, authorizing them to market and sell all oil, gas and minerals produced upon the property covered by the leasehold. The date of this power of attorney is February, 1934 (Record, Exhibit 1, Cotros-Cross).

After the execution of the Indenture there was only one meeting of all of the parties thereto, which was called by Cotros, P. and T. for the purpose of determining whether they should sell the leasehold interest (fractional one-third) (Record p. 35).

No office was retained, no books kept, no sale had, no other interest acquired, no investments of any character made, no certificates of interest issued; in short, nothing was done by Cotros, P. and T. other than the receipt from the Lincoln Oil Co. of the net revenue due from the oil produced on the leasehold, and the distribution thereof by check to the parties entitled thereto under the Indenture (Record pp. 33-35).

There was only one copy made of the Indenture (the original), and that was retained by Cotros, P. and T. Later a copy was made for one or two of the other parties (Record p. 29).

Cotros, P. and T. had nothing whatever to do with any of the business relating to the drilling of wells, and payment of expenses in connection therewith, or the collection of the revenues derived therefrom. These matters were handled exclusively by the Lincoln Oil Company owning an undivided two-thirds interest in the leasehold. Neither did Cotros, P. and T. have anything to do with the marketing of the oil produced. The sole act performed by them, as Trustees, or individuals, was to receive from the Lincoln Oil Company the net amount to which they were entitled for the one-third interest and the pro rata distribution thereof to the parties entitled thereto, under the instrument of April 17, 1934 (Record pp. 30-32).

The group under the Indenture of April, 1934, made a partnership return to the Internal Revenue Department of the amounts received by them, and, individually, they paid income tax upon said income (Record pp. 68-74).

There was never any other lease or contract of any character in which the parties to the Indenture were jointly interested. This was the sole matter in which there was a common interest (Record p. 36).

THE DISTRICT COURT'S FINDING.

The Trial Court held that Cotros, P. and T. acquired a one-third undivided interest in the leasehold and became tenants in common with the Lincoln Oil Company in said lease; that the Lincoln Oil Company, with respect to the handling of all matters pertaining to the development of the oil, and the production and sale thereof, was merely acting as an agent for Cotros, P. and T.; that the parties other than Cotros, P. and T. likewise became tenants in common in the ownership of the property, "they owning a fractional part of the one-third undivided interest and achieving a unity of purpose and operation only through having a common agent. They had no agreement or arrangement among themselves as a group providing for the essential requirements of corporate control of the enterprise. The Court holds * * * there was no aggregation of individuals or separate entity having the attributes of a corporation," but were merely tenants in common of a fractional interest of a leasehold, "and did not constitute an Association taxable as a Corporation," under the Revenue Laws (Record pp. 75-76).

RULING OF COURT OF APPEALS.

The Appellate Court, in reversing the District Court, held that those whose names were annexed to the Indenture of April, 1934, constituted an Association taxable as a Cor-

poration, under the Revenue Laws, basing this conclusion solely upon the authority of *Helvering v. Combs*, 296 U. S. Rep. 365 (Record p. 86).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court with respect to this Petition seeking a right of Review by Certiorari is invoked under Section 347, Title 28, U. S. Code Annotated, being Section 240 (a) of the Judicial Code as Amended.

QUESTION PRESENTED.

Under the facts stated, are the parties to the Indenture of April, 1934, to be treated as an "Association" taxable under the Revenue Laws as a "Corporation," or

Are they to be treated as a Syndicate or Joint Venture, taxable as a Partnership?

U. S. Code Ann., Vol. 26, Sec. 1696 (Sec. 801, Revenue Act 1941).

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Opinion and Decree of the Circuit Court of Appeals is untenable and at variance with applicable decisions of this Court, to wit:

Lewis v. Commissioner, 301 U. S. 385.

And is not in accordance with the principles enunciated in

Morrissey v. Commissioner, 296 U. S. 344, and
Helvering v. Combs, 296 U. S. 395.

And is in conflict and at variance with the decisions of the Circuit Court of Appeals of the Fifth Circuit, to wit:

Commissioner v. Horseshoe Syndicate, 110 Fed. (2) 748;
Commissioner v. Rector, 111 Fed. (2) 332.

And is in conflict and at variance with the decisions of the Circuit Court of Appeals for the Ninth Circuit, to wit:

Myers v. Commissioner, 89 Fed. (2) 86;
Commissioner v. Gerstle, 95 Fed. (2) 587.

And is in conflict and at variance with the decisions of the Second Circuit Court of Appeals.

Commissioner v. Chase Nat'l Bank, Aug. 14, 1941.

The annexed Brief, which is prayed to be taken as a part hereof, analyzes the above authorities, and in our humble opinion will disclose that the decision of the Court of Appeals for the Sixth Circuit in the instant case is untenable.

CONCLUSION.

Your Petitioners present herewith a Transcript of the Record in the Circuit Court of Appeals and pray that a Writ of Certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court a full and complete Transcript of all the proceedings of said Court of Appeals in said case, **Nashville Trust Company, Executor etc. v. George Cotros et al.**, No. 8641 of said Court, to the end that said case may be reviewed and determined by this Court as provided by law; that your Petitioners may have such other and further relief or remedy in the premises as may seem appropriate, and that the Decree of the said Court of Appeals in said case be reversed by this Honorable Court, and your Petitioners will ever pray.

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